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PETITION FOR CERTIORARI
NO. 983

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

BUFORD WILSON WORLEY AND A. C. BENNETT,
Petitioners

VERSUS

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioners pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit, dated November 3, 1966, and the Order of the said Court, dated December 20, 1966, denying a Petition for Rehearing.

OPINIONS BELOW

There was no formal opinion of the District Court. (See Appendix A). The opinion of the Court of Appeals is not yet reported, but attached hereto and marked as Appendix B is a copy of the Court's opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1966. A Petition for Rehearing was denied on December 20, 1966. Appendix C. The jurisdiction of this Court is invoked under 28 United States Code, Section 1254.

QUESTIONS INVOLVED

1. Whether it is the duty of the Trial Judge or Defense Counsel to suggest methods to the Government's attorneys in a criminal prosecution of proper procedures to be followed when in fact counsel for petitioners were charged only with the responsibility of interjecting proper objections to improper procedures by the Government.

2. Whether typewritten transcription of telephone conversations are admissible in evidence or may they be read to a jury in a criminal proceeding when the original recordings are not offered in evidence by the Government and more particularly when the original recordings are in the Government's possession.

3. Whether the decision below conflicts with prior decisions of this Court which set forth the procedure to be followed in offering and publishing transcripts of tape recordings.

STATEMENT OF CASE

The petitioner, A. C. Bennett, was indicted for possession of one-half pint of whiskey to which no revenue or tax stamps had been affixed; both of the petitioners were indicted, along with Richard Hayes Hinton, for aiding and abetting in the selling of whiskey to which no revenue or tax stamps had been affixed.

At the time the case was called for trial, the government produced testimony of Mr. James Allred who was employed by the Alcohol and Tobacco Tax Unit of the U. S. Treasury Department. Mr. Allred, in his capacity as an undercover agent, assumed the fictitious identity of Jim Hutto and held himself out to be a bootlegger. Contact was allegedly made with Agent Allred in Columbia, S. C., by the petitioner, Buford Wilson Worley, by telephone from Virginia, at which time Mr. Allred was informed that someone would be down to see him about the purchase of some liquor. Subsequently, A. C. Bennett and one Richard Hayes Hinton arrived at a restaurant in Columbia, South Carolina, where

an alleged agreement was made by and between James Allred and Richard Hayes Hinton for the sale and purchase of liquor. It was on this occasion that the petitioner, A. C. Bennett, allegedly removed a sample one-half pint of liquor from the car in which he and Richard Hayes Hinton were riding.

The petitioner, A. C. Bennett, and Richard Hayes Hinton were not arrested at this time and were permitted to leave Columbia, South Carolina.

At the time of the trial of the case, the Government called undercover agent, James Allred, who testified that he had made a recording of a telephone conversation allegedly with the petitioner, Buford Wilson Worley.

Rather than introduce the recorded telephone conversation, the Government produced a typewritten transcription of the alleged recorded telephone conversation which supposedly compared with the recorded telephone conversation. It is noteworthy that at no time did the government establish who transcribed the recording or did they have the stenographer who did the transcribing testify. Mr. Allred's testimony was that he had compared the transcription with the recordings and that they were the same.

Telephone conversations allegedly occurring between A. C. Bennett and James Allred were offered in evidence in the same manner; that is, only a transcription of the alleged recorded telephone conversations was used and published. At no time were the recordings, disc, or tapes introduced into evidence by the Government, although they were reportedly in the possession of the Government.

Objections were properly interposed by Counsel for the petitioners as to the introduction and publication to the jury of the dialogue between Mr. Allred and the petitioners, but such objections were overruled.

Numerous alleged transcriptions of recordings of conversations were introduced into evidence without the actual recordings, disc, or tapes being introduced into evidence or being played. By the Government's failure to properly introduce the telephone recordings, there are questions as to

the chain of possession, and completeness of contents of the entire recordings, their clarity, the accuracy of the typewritten transcription and of the positive identification of the voices of the petitioners, A. C. Bennett and Buford Wilson Worley.

The District Judge erred in allowing into evidence typed transcripts of alleged sound recordings of telephone conversations where the sound recordings themselves were not introduced. The Courts have established specific procedures to insure that petitioner's rights are not violated through the use of transcripts of what may be incomprehensible or even non-existence sound recordings.

These procedures were not followed. The transcripts, though secondary evidence, were admitted without proper foundation with no explanation as to why the recordings were not admitted. Petitioners interposed proper objections to this procedure.

The serious challenges which developments in electronic recording devices present to the integrity of the individual and his constitutional rights require that their use be closely scrutinized by the Courts and any variation from the established criteria for their admission into evidence be proscribed.

REASONS FOR GRANTING THE WRIT

I.

The greatest significance of this case and present decision is not the fact that transcriptions of tape recordings were published to the jury without having offered in evidence the original tape recordings, but the fact that a new area of responsibility in the defense of criminal matters has developed if the present decision is permitted to stand.

Prior to the time the transcriptions were originally published, objections were made by counsel for the petitioner, Buford Wilson Worley, that such a procedure violated the best evidence rule. Subsequently, when it appeared that the transcriptions affected the rights of the petitioner,

A. C. Bennett, proper objections were made by counsel for him.

The decision of the Circuit Court rests heavily on the fact that the District Judge asked the petitioners if they would rather have the recordings. The answer of the petitioners was apparently overlooked in that it was stated, "Your Honor, we will have to take up that matter when it comes up, I guess. —Right now, we are objecting to the— to a proposed dialogue between two individuals simulated in a telephone conversation." The authorities are clear that it is no part of a judge's duty to caution or advise prosecuting attorneys in order to supply some deficiency in proof of testimony favorable to government. *United States vs. Carengella*, 198 F. 2d 3 (1952), *cert. den.*, 73 S. Ct. 179, 344 U. S. 881, 97 L. Ed. 682. Neither is it the duty of defense counsel to advise or suggest to the government's attorneys ways to correct their procedure. Defense Counsel should be permitted to simply object to improper procedure.

It is the responsibility of a judge to rule on objections to evidence or procedure and not suggest methods to be followed by the Government. The Trial Judge is an eminently fair and learned Jurist and Gentleman but quite unintentionally, it is felt, placed an extra duty on defense counsel inconsistent with the rights of the defendants and inconsistent with defense counsel's duty to their clients. Certainly the petitioners waived none of their rights as the record shows continuing objections to the procedure followed by the government.

To place the responsibility or burden on the petitioners in demanding or requesting that the actual tape recordings be produced is to reverse the burden of proof in a criminal proceeding. It is the responsibility of the prosecution to produce evidence at hand and not that of the Trial Judge or of the attorneys for the petitioners to demand that evidence be brought forth.

The tape recordings were more accessible to the Government than to the petitioners. Further, it was only the Government's witnesses that could lay the proper foundation

for the recordings' introduction into evidence, and to presume that petitioners had access to such recordings is not only erroneous but prejudicial. The petitioners should not be charged with the responsibility of requesting evidence not knowing its materiality, relevancy, content or substance. For an attorney to request such evidence would be a violation of his responsibility to his client. It was clearly incumbent upon the prosecution to produce such tape recordings and it was the duty and responsibility of the petitioners to object to the improper procedure which was followed.

II.

The question of the admissibility of recorded conversations has been a matter frequently before the courts. See generally 58 A. L. R. (2d) 1024-1052. Although many different points have been reviewed during these years, certain criteria for admissibility for such recorded conversations appear generally throughout the cases. A brief statement of such criteria is found in the recent case of *United States of America v. McKeever*, 169 F. Supp. 426 (U. S. D. C., S. D. New York, 1958). There the Court stated:

> "A review of the authorities leads to the conclusion that, before a sound recording is admitted into evidence, a foundation must be established by showing the following facts:
>
> "(1) That the recording device was capable of taking the conversation now offered in evidence.
>
> "(2) That the operator of the device was competent to operate the device.
>
> "(3) That the recording is authentic and correct.
>
> "(4) That changes, additions, or delegations have not been made in the recordings.
>
> "(5) That the recordings has been preserved in a manner that is shown to the Court.
>
> "(6) That the speakers are identified.
>
> "(7) That the conversation elicited was made vol-

untarily and in good faith, without any kind of inducement." *Ibid.* at 430.

In general, it may be seen, that the thrust of these criteria is aimed at assuring the accuracy and authenticity of the recording and preserving for opposing counsel an adequate opportunity to challenge the recordings on these matters.

In dealing with the specific problem of recorded telephone conversations, the Courts have traditionally carried forward these basic requirements. Thus, it has been stated:

> "[I]t is now almost universally held that sound recordings, if relating to otherwise competent evidence, are admissible providing a proper foundation is laid for their *admission.*" (Italics added.) (58 A. L. R. (2d) at page 1027).

In earlier cases, the United States Supreme Court had taken a very unrestrictive approach. Typical of these are *Olmstead v. United States*, 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928) (holding, wire tap recordings admissible). *Goldman v. United States*, 316 U. S. 129, 62 S. Ct. 993, 86 L. Ed. 1322 (1942) (holding detectaphone evidence admissible); and *On Lee v. United States*, 343 U. S. 747, 72 S. Ct. 967, 96 L. Ed. 1270 (1952) (holding radio-transmitted oral conversation admissible). These cases were all decided with considerable emphasis placed upon the issue of trespass or physical encroachment within a constitutionally protected area. In more recent decisions, the Supreme Court has moved away from these more technical grounds to a consideration of more fundamental constitutional problems. See *Silverman v. United States*, 365 U. S. 505, 81 S. Ct. 679, 5 L. Ed. (2d) 734 (1961); also *United States v. Stone*, 232 F. Supp. 396 (U. S. D. C., N. W. Tex. 1964).

In recent years, the increasing problems occasioned by electronic listening devices have been the subject of extensive discussions both by the Courts and by Congress. In *Lopez v. United States*, 373 U. S. 427, 83 S. Ct. 1381, 10 L. Ed. 462 (1963), Justice Brennan, in a dissenting opinion stated:

> "Electronic aids add a wholly new dimension to eaves-dropping. They make it more penetrating, more indiscriminate, more truly obnoxious to a free society
>
> . . .
>
> "Not only has the problem grown in recent years (citations omitted), but its true dimensions have only recently become apparent from empirical studies not available when Olmstead, Goldman, and On Lee were decided." *Ibid.* at p. 466.

See also "A New Constitutional Limit for Electronic Surveillance Cases", 7 William and Mary Law Review, 93, (1966).

The foregoing discussion of the background law in the area of recording of telephone conversations and their admissibility in evidence indicates that this type of evidence has posed serious problems for the Courts. In all of the cases, however, *the original recordings were placed in evidence.* Even in these cases, the Courts have attempted to assure the opposing counsel opportunity to determine the accuracy of the recording. In *United States v. McKeever*, 169 F. Supp. 426, at p. 431 (U.S.D.C., S.D. New York (1958)), the Court stated:

> "Courts should deal with this class of evidence in a manner that will make available to litigants the benefits of this scientific development. *Safeguards against fraud and other abuse are provided by judicial insistence that a proper foundation for such proof be laid.*" (Italics added).

In the present case, the original recordings of the purported telephone conversations were never offered in evidence. Instead, alleged transcriptions of the same were read before the jury. This procedure was followed in spite of repeated objections from attorneys for the petitioners. Under such circumstances, it is difficult to see how any pretense was made of satisfying the safeguards set forth above. The questions of the audibility, reliability, voluntariness and completeness of the recordings were effectively forestalled from consideration. No opportunity was af-

forded petitioners' counsel to check the accuracy of the recordings until after the Trial. The identifiability of the voices was taken from the jury as a matter to be determined. No attempt was made to reassure the Court that the recordings had been properly preserved. In short, the entire procedure transgressed the spirit of all the cases cited above. The ultimate result was to allow purely secondary evidence to be admitted when better evidence was available and violate all foundation requirements for the actual introduction of recordings had same been attempted.

In the frequently cited case of *United States v. Schanerman*, 150 F. (2d) 941 (C. App., 3rd Cir., 1945) dealing with a similar question, the Court, after holding that recordings were admissible, went on to state:

> "Transcribed notes, made by a stenotype operator from hearing the records repeatedly 'played', were properly excluded . . ."

In the case of *People v. King*, 225 P. (2d) 950 (Cal. 1951), the Court held that a re-recording of a recorded conversation was improperly admitted. The Court commented that the re-recordings were secondary evidence and should not have been received in evidence. See also Comment, 64 Harv. L. Rev. 1369 (1951) discussing this case and stating:

> "Although a recording is not colloquially considered to be a writing, it is defined as such in the Model Code of Evidence, Rule I (17) (1942), and should be similarly treated in relation to the best evidence rule since the policy of the rule—to obtain the most truly probative evidence of a preserved communication—is equally applicable to recordings."

In a similar case in the Federal Courts, *United States v. Hall*, 342 F. (2d) 849 (4th Cir. 1965), a different result was reached as to the use of re-recordings and transcriptions, but the case was significantly different in that the original recordings were introduced and played before the jury. Only thereafter were the other materials used.

In another State Court case, *Bonicelli v. State*, 339 P.

(2d) 1063 (Okla. 1959), the following significant language is found:

> "The second contention that the admissions of the transcripts of the tape-recorded confession of defendant, herein before referred to, was reversible error, is highly meritorious . . . Assuming, however, that such predicate had been laid, and the recording was otherwise admissible, it would not be improper to play it for the jury. But, to permit written transcript thereof to be furnished to the jury violated the best evidence rule, since the recording was the best evidence."

It is implicit in all of these decisions that the Courts involved have all recognized the inherent dangers that occur under such circumstances. It is readily apparent that the casting of testimony in the form of an alleged recording of a telephone conversation gives to such testimony weight and credibility beyond that which it would bear if merely elicited from a witness on the stand. In such cases, the opposing counsel should be given every opportunity to challenge and question the evidence. No such opportunity was afforded in this proceeding. The methods of introducing the testimony utilized by the Government were designed to secure every benefit to be derived from the extra weight which popular belief accords such recordings without in any way allowing opportunity for proper cross-examination and attack. The evidence was, in effect, insulated from the normal methods of challenge. The original recordings were not played for the judge or jury. Petitioner's counsel were not given any opportunity to compare them with the purported transcripts. The stenographer who typed the transcripts was not presented as a witness. In short, none of the usual methods were followed. It cannot help but be a matter of speculation as to why the original recordings were not introduced. If the transcripts were accurate, what possible detriment would the Government have suffered. Were the original recordings garbled? Were the voices not identifiable? Did the recordings contain evidence which would have benefitted the Petitioners?

Were the recordings even in existence or had they been lost or destroyed? These questions, natural as they are, are not posted to suggest any impropriety on the part of the District Attorney's office. Rather, the mere fact that they do exist as valid questions underline the *gravamen* of Petitioner's Complaint concerning the procedures used. All of these questions could have been answered by one simple act, the introduction of the original recordings. This simple act was not forthcoming in spite of repeated objections to the procedure used by attorneys for Petitioners as well as suggestions and questions by the Trial Judge.

In this day our Courts have shown an increasing concern for protecting the right of privacy. Such miracles have taken us to the brink of space but they have also invaded the sanctity of the individual. In an area of the law where the Courts daily demonstrate an increasingly skeptical and restrictive attitude toward the use of such evidence, even those areas where such recordings are allowed as evidence should be carefully scrutinized to see that such evidence comes into Court only in a proper form and surrounded with adequate safeguards. To do anything less would be to strip from the accused those protections which are necessary in an age when scientific developments threaten increasingly the privacy of the individual. Only the Courts can see that such protections are provided.

III.

The government in offering in evidence transcriptions of tape recordings varied from the law as it is known and exists today. It is clear in the decisions of the Courts that inherent dangers occur when testimony of the nature produced by the prosecution is used and certain safeguards have been set forth by the court. The Circuit Court referred to the case of *U. S. v. Hall* 342 F. 2d 849 (1965), cert den. 382 U. S. 812, but overlooked the fact that even in that case the tape recordings were offered in evidence prior to the time the transcriptions were published. In all of the cases set forth in section 2 hereinabove, the

tape recordings were offered in evidence prior to the time transcriptions of testimony were published to the jury.

CONCLUSION

The procedure of publishing transcriptions of tape recordings to a jury without having offered the tapes in evidence is contrary to established law.

It was prejudicial error for a Trial Judge to ask counsel if they wished the tapes produced when, in fact, attorneys for petitioners had interposed appropriate objections to the procedure followed by the prosecution, and as defense counsel had no duty to instruct the Government's attorneys in the proper method to convict their clients.

For the reasons stated, the Court should grant a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

Now, as to the defendant Buford Wilson Worley, who was charged in only one count of the indictment, that was count two, and was found guilty by the jury; it is the sentence of the Court that that defendant be committed to the custody of the Attorney General or his authorized representative for a period of three years and that he pay a fine of $1,000.00.

Now, as to the defendant A. C. Bennett, who was found guilty on counts one and two of the indictment, it is the sentence of this Court that that defendant, on count two of the indictment, be committed to the custody of the Attorney General or his authorized representative for a period of twelve months. On count one of the indictment the imposition of sentence is suspended and the defendant is placed on probation for a period of four years, that probationary sentence to commence when the defendant is released from serving his sentence on count two of the indictment.

APPENDIX B

Before HAYNSWORTH, Chief Judge, and SOBELOFF and CRAVEN, Circuit Judges.

N. Welch Morrisette, Jr., for Appellant in No. 10,622, and Charles B. Bowers for Appellant in No. 10,624 (G. Raymond McElveen, and Lightsey & Bowers on joint brief for Appellants), and Charles S. Porter, Jr., Assistant United States Attorney, (Terrell L. Glenn, United States Attorney, on brief) for Appellee.

PER CURIAM:

The only question presented by this appeal is whether on the facts of this case the District Court committed reversible error in permitting the United States to offer in evidence typed transcriptions of recorded telephone conversations.

A special agent of the Alcohol and Tobacco Unit of the Treasury Department testified that he identified Worley and Bennett as the persons talking, that he recorded the conversations, that he had the recordings,[1] that transcriptions had been made of them, and that he had compared the transcriptions to the recordings and that they were the same. Upon this foundation the United States offered the transcripts into evidence.

Although the basis for appellants' objections in the court below is not entirely clear in the record, we assume for purposes of this decision, as contended for by appellants, that the ground for the objection was that the tape recordings per se were the "best evidence", and that the failure of the United States to offer the recordings left a fatal gap in establishing authenticity of the transcriptions.

We think appellants' position is without merit because the record shows that before the transcriptions were received it was shown that the recordings were available and the District Judge indicated willingness to order them to be produced, in words as follows: "Well, he says he has the recording available here. Would you rather have the recording?"

Even after notice of appeal, counsel for the United States in open court offered to make the recordings available to counsel for appellants Bennett and Worley for the purpose of comparison with the transcripts introduced. It does not appear that the offer was ever accepted, and it is not asserted before us that the transcripts used varied from the tape recordings. Compare *United States v. Hall*, 342 F. 2d 849 (4th Cir. 1965).

Affirmed.

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[1] They were in the office of the United States Attorney and readily available.

APPENDIX C

United States Court of Appeals

FOR THE FOURTH CIRCUIT

NO. 10,622

UNITED STATES OF AMERICA, *Appellee,*

VERSUS

BUFORD WILSON WORLEY, *Appellant.*

ORDER

Upon consideration of the petition for rehearing.

It is now ordered: That the petition for rehearing be, and hereby is, denied.

CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

SIMON E. SOBELOFF
United States Circuit Judge

J. BRAXTON CRAVEN, JR.
United States Circuit Judge

Filed Dec. 20, 1966. A true copy, Teste:

MAURICE S. DEAN, *Clerk,*
U. S. Court of Appeals for the
Fourth Circuit.

By: MARGARET L. DAVIS,
Deputy Clerk.

APPENDIX C

United States Court of Appeals

FOR THE FOURTH CIRCUIT

NO. 10,624

UNITED STATES OF AMERICA, *Appellee,*

VERSUS

A. C. BENNETT, *Appellant.*

ORDER

Upon consideration of the petition for rehearing.

It is now ordered: That the petition for rehearing be, and hereby is, denied.

CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

SIMON E. SOBELOFF
United States Circuit Judge

J. BRAXTON CRAVEN, JR.
United States Circuit Judge

Filed Dec. 20, 1966. A true copy, Teste:

MAURICE S. DEAN, *Clerk,*
U. S. Court of Appeals for the
Fourth Circuit.

By: MARGARET L. DAVIS,
Deputy Clerk.